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No. 82-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD NIXON,

Petitioner,

v.

GERALD P. CARMEN, Administrator, General Services Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether some constitutionally protected privacy interest of former President Richard Nixon prohibits the Administrator of General Services from allowing researchers to listen to White House tape recordings of nonpersonal, nonprivileged conversations relating to governmental matters.

Whether recorded materials that are claimed by Mr. Nixon to be personal diaries must be treated as inherently private or personal and therefore surrendered to him without being reviewed by archivists in the detail necessary to determine whether they in fact constitute such diaries.

Whether the district court abused its discretion in denying certain of Mr. Nixon's requests for discovery.*

*Parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit were Richard Nixon, Plaintiff-Appellant; Rowland G. Freeman, III, as Administrator of General Services, Defendant-Appellee; and The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, J. Anthony Lukas, Austin Ranney, and Clement E. Vose, Defendants-Appellees. Dr. Herzberg is now deceased.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

I. THE CONSTITUTION DOES NOT BAR THE PUBLIC FROM LISTENING TO NONPERSONAL, NONPRIVILEGED PORTIONS OF THE WHITE HOUSE TAPES THAT RELATE TO GOVERNMENTAL MATTERS 8

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S DECISION IN *NIXON* V. *ADMINISTRATOR* IN ALLOWING ARCHIVISTS TO REVIEW DICTABELTS IN THE DETAIL NECESSARY TO DETERMINE WHETHER THEY CONSTITUTE A PERSONAL DIARY 15

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. NIXON'S UNTIMELY DISCOVERY REQUESTS 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 11

Nixon v. Administrator,
433 U.S. 425 (1977) 10-11, 13, 14, 15, 16, 17, 20

Nixon v. Administrator,
408 F.Supp. 321 (D.D.C. 1976) 17

Nixon v. Warner Communications, Inc.,
435 U.S. 589 (1978) 9

Public Affairs Associates, Inc. v. Rickover,
369 U.S. 111 (1962) 20

United States v. Morgan,
313 U.S. 409 (1941) 13

Statutes:

Presidential Recordings and Materials Preservation
Act, 44 U.S.C. § 2107 (note) (1976) ..... *passim*

Regulations:

41 C.F.R. § 105-63.104 ..... 1, 2, 3

41 C.F.R. § 105-63.401 ..... 2, 3, 9, 12

41 C.F.R. § 105-63.401-1 ..... 2, 4, 9, 12

41 C.F.R. § 105-63.401-2 ..... 1, 2, 3, 4, 9

41 C.F.R. § 105-63.401-3 ..... 2, 3, 9

41 C.F.R. § 105-63.402-1 ..... 2, 3

41 C.F.R. § 105-63.402-2 ..... 2, 3

Page

41 C.F.R. § 105-63.404 1

41 C.F.R. § 105-63.405 ..... 2, 9

Other Authorities:

J. Moore, 6 *Federal Practice* ¶ 56.17[3] (1982) 20

C. Wright & A. Miller, 8 *Federal Practice and Procedure* § 2036 (1970) 18

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Respondents, The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, *et al.*, respectfully request that the petition for a writ of certiorari be denied.

STATUTES AND REGULATIONS INVOLVED

The Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (note) (1976), and Sections 105-63.104(b), 105-63.401-2(a), and 105-63.404 of Title

41, Code of Federal Regulations, are reproduced in Appendix E to the Petition. (Pet. App. E. 45a-53a.) Sections 105-63.104(a), 105-63.401, 105-63.401-1, 105-63.401-2, 105-63.401-3, 105-63.402-1, 105-63.402-2, and 105-63.405 of Title 41, Code of Federal Regulations, are reproduced in Appendix 1, *infra* (2a-13a.)[1]

STATEMENT OF THE CASE

Former President Richard Nixon initiated this action on August 10, 1977, to challenge certain regulations promulgated by the Administrator of General Services ("the Administrator") pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (note) (1976). Mr. Nixon's original complaint attacked the validity of various regulations pertaining to the processing of, and government access to, historical materials of the Nixon Administration in the Administrator's custody.[2] In December 1977, regulations governing *public* access to the materials became effective, and on January 31, 1978, Mr. Nixon amended his complaint to challenge those regulations as well. The amended complaint, which contained nineteen counts, attacked the public access regulations in many respects.

On June 9, 1978, the district court granted the motion of The Reporters Committee for Freedom of the Press, *et al.*, to intervene as defendants. Thereafter, the parties engaged in extensive negotiations in an attempt to resolve as many issues as possible. By an agreement dated

[1]The appendices to this Opposition to the Petition shall be cited as "Opp. App. [page(s)]."

[2]Mr. Nixon filed a First Amended Complaint on August 19, 1977 to include a challenge to certain revisions made to the government access regulations.

February 14, 1979, the parties settled all but two of the claims raised by Mr. Nixon's amended complaint. (The settlement agreement is set forth as Appendix 2 hereto, Opp. App. 14a-17a.) The agreement provided that the Administrator would submit to Congress various modifications of the regulations. This was done, and the amended regulations became final. They are codified at 41 C.F.R. Part 105-63.

The regulations establish procedures by which the materials of the Nixon Administration will be reviewed and screened by archivists and thereafter selectively made available to the public. As revised pursuant to the settlement agreement, the regulations contain many provisions that protect both Mr. Nixon's right of privacy in personal materials and his right to assert executive privilege with respect to governmental matters. The regulations require, for example, that all personal materials among the items in the Administrator's custody be returned to Mr. Nixon as soon as they have been identified and segregated, and mandate that archivists or other authorized officials shall not disclose any private or personal information learned in the course of their screening activities. 41 C.F.R. §§ 105-63.401-2, .401-3. The archival screening process established by the regulations is similarly designed to prevent any public disclosure of any of Mr. Nixon's family matters, personal financial information, or other aspects of his personal life. *Id.* §§ 105.63.104(b), .401(a), .402-1, .402-2.

At least thirty days before opening each segment of materials to public access, the Administrator must publish notice of the proposed release in the Federal Register and send a copy of the notice to, *inter alia,* Mr. Nixon or his designated agent. *Id.* § 105-63.401(b). If Mr. Nixon claims that any of the materials are personal, he may notify the

Administrator of his claim and have the matter considered and determined by a five-member Presidential Materials Review Board. *Id.* §§ 105-63.401-1(d), .401-2(f). With regard to the confidentiality of governmental matters, the regulations preserve Mr. Nixon's right to assert claims of executive privilege as to any materials that he believes fall within the scope of the privilege and require confidentiality. *Id.* at § 105-63.401-1(a).

As indicated, the settlement agreement among the parties left only two issues unresolved. The first is whether researchers may listen to reference copies of the nonpersonal, nonprivileged portions of tape recordings made in the Oval Office and elsewhere during the Nixon Administration, at archival centers in various cities. Opp. App. 14a. The second concerns the manner in which certain tape recordings, alleged by Mr. Nixon to contain his personal diary, shall be screened by archivists for the purpose of determining whether such recordings do, in fact, constitute a diary. *Id.*

In March 1979, Mr. Nixon filed a Third Amended Complaint raising these two remaining issues. At the same time, Mr. Nixon proposed a schedule to the district court for disposition of his claims. He recognized that the issues were appropriate for resolution by summary judgment and therefore proposed that he would file a motion for summary judgment approximately one month after receiving responses to, in his words, "narrowly limited" discovery requests. (Mr. Nixon's proposal is reproduced in Appendix 3 hereto. Opp. App. 18a-20a.) The district court accepted Mr. Nixon's proposal.[3]

[3]The schedule that Mr. Nixon proposed contemplated discovery requests so limited that only *five days* would be allowed for responding, in contrast to the thirty days ordinarily permitted by the Federal Rules of Civil Procedure. *See* Opp. App. 18a-19a.

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Pursuant to his schedule, Mr. Nixon served a set of interrogatories, a request for production of documents, and a request for admissions on the Administrator. After receiving responses to the request for admissions, Mr. Nixon served a supplemental set of interrogatories. After the Administrator had responded to all of these discovery requests, Mr. Nixon moved for summary judgment.

Four days *after* he filed his summary judgment motion, Mr. Nixon sought leave to serve a subpoena *duces tecum* on Robert Lipshutz, then White House Counsel, to discover whether personnel in the White House had considered any "alternatives" to making the Nixon tapes available for public listening. The Administrator opposed this effort on the grounds that the requested materials were irrelevant to the validity of the tapes-access regulation, that the request would unnecessarily delay the proceedings, and that some of the documents would be privileged. The district court agreed and denied Mr. Nixon's request.

Shortly thereafter, the Administrator and the intervenor-defendants cross-moved for summary judgment. Mr. Nixon then noticed the depositions of the Ar-

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Mr. Nixon suggests in his Petition that he was forced to serve limited discovery requests because the district court had previously entered an order staying all discovery. Pet. 5. This is highly misleading. As the court of appeals observed, the stay order that Mr. Nixon cites had been entered in November 1977 with respect to Mr. Nixon's original complaint challenging the so-called government-access regulations, and not with regard to the public-access issues raised by the second and third amended complaints. *See* Pet. App. 36a-37a. The district court placed no prior restrictions on Mr. Nixon's discovery in 1979 on the public-access issues. Indeed, when Mr. Nixon proposed his expedited schedule for discovery and briefing in March 1979, he did not even refer to the 1977 order and did not contend that it restricted his discovery plans in any way. *See* Opp. App. 18a-20a.

chivist of the United States and a Deputy Assistant Archivist, and subpoenaed from those individuals documents concerning the extent to which tape recordings involving Presidents Kennedy and Johnson had been made available to the public. The Administrator moved to quash the subpoenas on the ground that the availability or nonavailability of materials of prior Presidents was irrelevant to the validity of regulations under the Presidential Recordings and Materials Preservation Act. The Administrator also sought a protective order prohibiting further discovery until the pending motions for summary judgment were decided. The district court granted the Administrator's motion and subsequently granted summary judgment in favor of the Administrator and intervenor-defendants. Pet. App. 41a-43a.

The court of appeals affirmed in an opinion by Judge McGowan. Pet. App. 1a-39a. The court held that because the regulations specifically require that private or personal material be identified and returned to Mr. Nixon, and provide procedures for asserting constitutionally based objections to any public access, the provision allowing researchers to listen to reference copies of tapes does not implicate Mr. Nixon's privacy rights (including his rights of associational privacy protected by the First Amendment). *Id.* 15a-17a.

For the same reasons, the court of appeals held that the tapes-access provision does not unduly infringe upon the presidential privilege of confidentiality. Pet. App. 18a-28a. The court noted that the regulations permit Mr. Nixon to assert claims of privilege as to any conversations as to which he believes there is an ongoing need for confidentiality. The court also took account of the fact that the incumbent President, who "is best situated to judge when disclosure will adversely affect his receipt of candid

advice and discussion" (*id.* 20a), had not raised any challenge to the tapes-access provisions, and emphasized that the presidential privilege of confidentiality had eroded in the time – now more than nine years – since the last tape was produced.

The court of appeals also upheld the archivists' review of Mr. Nixon's dictabelts in the detail necessary to ascertain whether they constitute a personal diary to be returned to Mr. Nixon. Pet. App. 28a-36a. Based on Mr. Nixon's own admissions in his affidavit, the court rejected Mr. Nixon's suggestion that certain "trigger phrases" on the dictabelts were alone sufficient to identify them as diaries. *Id.* 34a-36a. Accordingly, the court refused to prohibit the archivists from undertaking an appropriate review – including, if necessary, a word-by-word review – of dictabelts that may, as a result of the review, be identified as diaries.

Finally, the court of appeals held that the district court did not abuse its discretion in limiting certain of Mr. Nixon's discovery efforts. The court noted that those discovery efforts were untimely under the schedule that Mr. Nixon himself had proposed, and that, in any event, the information that he had belatedly sought was irrelevant to the issues presented. Pet. App. 36a-39a.

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTION DOES NOT BAR THE PUBLIC FROM LISTENING TO NONPERSONAL, NONPRIVILEGED PORTIONS OF THE WHITE HOUSE TAPES THAT RELATE TO GOVERNMENTAL MATTERS

The issue now before this Court with respect to public access to the White House tapes is extremely narrow. Mr. Nixon does not challenge the Administrator's right and duty under the Presidential Recordings and Materials Preservation Act to release the substance of the nonpersonal, ~~nonpublic~~ nonprivileged portions of the White House tapes in some form at some point in time. The issue, in Mr. Nixon's words, is simply "the *time, place* and *manner* in which the substance of the presidential tape recordings will be made available to the public." (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, May 4, 1979, at 1, emphasis added.) Mr. Nixon claims that he has a personal privacy interest in taped conversations relating to governmental matters, and he argues that this interest should have been accommodated by delaying access to the tapes for a period of years and/or by releasing transcripts or synopses in lieu of permitting the public to listen to the tapes.

In order to place the tapes-access issue in perspective, it is important to recognize what is *not* legitimately in dispute in this case:

First, the issue is not whether Mr. Nixon's personal conversations with family members and others will be released to the public. The regulations permit researchers to listen only to those portions of taped conversations pertaining to governmental matters and do *not* allow researchers to listen to personal conversations. Before any tapes are

made available to researchers, they will be carefully reviewed pursuant to an archival screening process designed to prevent disclosure of personal matters. And, as noted above, the regulations provide a procedure for Mr. Nixon to challenge proposed public access to any materials that he claims are private or personal. 41 C.F.R. §§ 105-63.401, .401-1, .401-2, .401-3.

Second, the issue is not whether any particular tapes should be withheld from the public on the basis of executive privilege. Again, the regulations provide a procedure for Mr. Nixon to challenge proposed public access to any materials that he believes should be withheld on that basis. *Id.* §§ 105-63.401(b), .401-1. Although Mr. Nixon seeks to raise certain privilege arguments in his Petition, there is no merit to his across-the-board, undifferentiated claims (see pp. 12-13, *infra*).

Third, this case does not involve the question whether the public should be entitled to obtain recorded copies of presidential conversations. The regulations do not authorize reproduction of the tapes. *Id.* § 105-63.405. Consequently, this case does not present the issues of public availability that were before this Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).[4]

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[4]Certain other issues that Mr. Nixon seeks to raise in footnotes and elsewhere in his Petition are not properly before the Court at this time. On page 7 and footnote 3 of the Petition, Mr. Nixon suggests that the regulations are defective in that they give inadequate protection to private, political materials pertaining to partisan politics. Mr. Nixon made this claim in his Second Amended Complaint (Count 7, ¶ 21), filed in January 1978, where he alleged that the Administrator's definition of Presidential historical materials unlawfully included materials "made or received by Mr. Nixon or his staff in connection with, *inter alia*, his political activities. . ." This issue, however, was disposed of by the February 1979 settlement agreement and was not litigated in the courts below.

In challenging the regulations providing for ultimate public access to some of the non-personal tapes, Mr. Nixon thus seeks to ignore the broad protections accorded to him by the regulations and urges the Court to create an unprecedented, unnecessary, new constitutional right. He urges this Court to rule that, in addition to personal privacy rights in personal materials and governmental privacy rights in governmental materials (*i.e.*, executive privilege), public officials should also have a constitutionally protected *personal* right of privacy in *governmental* materials.

Mr. Nixon does not explain in his Petition, and did not explain in the courts below, how this new constitutional "right" differs from executive privilege or why it is necessary. He argues that a President should be permitted to discuss potential legislation, the condition of national affairs, and so forth in private (Pet. 11), but this is precisely why the doctrine of executive privilege was developed.

The proposition that public officials should have a personal privacy right in governmental deliberations, over and above the protections granted by executive privilege, would have far-reaching consequences. For example, if a public official were subpoenaed by a congressional committee or court to give testimony concerning closed-door conversations involving use of government power, the official would be permitted to invoke this new constitutional right of personal "privacy" to impede the inquiry.

The court of appeals' rejection of Mr. Nixon's argument is consistent with this Court's decision in *Nixon v. Administrator*, 433 U.S. 425 (1977). That case, which upheld the facial validity of the Presidential Recordings and Materials Preservation Act, held that Mr. Nixon does not have a constitutionally protected, personal privacy interest

in governmental matters. In holding that archival screening of all of Mr. Nixon's presidential materials would not unconstitutionally invade his right of privacy, this Court stressed that Mr. Nixon has a privacy interest in only "a very small fraction" of the materials of his Presidency – and not in the "overwhelming bulk" of his papers and tapes pertaining to "the official conduct of his Presidency." *Id.* at 459. In discussing Mr. Nixon's right of privacy, the Court repeatedly referred to his "private materials," "personal matters," "private information" and "private communications between him and, among others, his wife, his daughters, his physician, lawyer, clergyman, and his close friends" – as distinguished from materials relating to "the official conduct of his Presidency," matters concerning "any acts done by [him] in [his] public capacity," and tape recordings pertaining to "the conduct and business of the Presidency." *Id.* at 456, 457, 459. The "overwhelming majority" of Mr. Nixon's papers and tapes, this Court said, fall into the latter categories, and in light of his "status as a public figure," Mr. Nixon "lack[s] . . . any expectation of privacy" in such materials. *Id.* at 465. *See generally New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (individuals who have elected to place themselves in the public spotlight surrender certain privacy protections).[5]

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[5]The Petition asserts that the court of appeals defined Mr. Nixon's right of privacy according to the *content* of what was expressed in a taped conversation – that is, according to whether the content consisted of nongovernmental, personal topics. Pet. 10. In fact, the court of appeals, like this Court in *Nixon* v. *Administrator,* defined Mr. Nixon's right of privacy according to the reasonableness of his expectation of privacy. Pet. App. 15a-16a. In doing so, the court of appeals followed, and did not deviate from, the cases Mr. Nixon cites for the proposition that Fourth Amendment privacy protection derives from one's legitimate expectation of privacy. *See* cases cited at Pet. 10.

Mr. Nixon also suggests that the regulation permitting researchers to listen to reference copies of the tapes infringes upon the presidential privilege of confidentiality, in addition to his personal privacy rights. As the court of appeals emphasized, however, the regulations fully protect any remaining presidential privilege. Pet. App. 19a-21a. Before any materials are opened to the public, the regulations require that both the incumbent President and Mr. Nixon be notified. 41 C.F.R. § 105-63.401(b). If either the incumbent President or Mr. Nixon believes that disclosure would violate the privilege, he may object administratively and may obtain judicial review of any adverse determination. *Id.* § 105-63.401-1(a). *See* Presidential Recordings and Materials Preservation Act § 105(a), 44 U.S.C. § 2107 (note) (1976).

Mr. Nixon claims that the regulations provide inadequate protection because they do not require the archivists to withhold materials on grounds of executive privilege but instead require *him* or his representatives to assert privilege as to particular conversations. Pet. 14 n. 6. This contention is not properly before the Court,[6] and, in any event, is without merit. As the court of appeals indicated, the very nature of the privilege necessitates that claims be asserted on a disclosure-by-disclosure basis by Mr. Nixon or by the incumbent President. This is because the question whether particular material implicates the privilege "depends on whether disclosure will affect the flow of ex-

[6]This issue was explicitly raised by Mr. Nixon's Second Amended Complaint, filed in January 1978, in which he alleged that the regulations were unconstitutional in that they "do not contain any provision exempting from disclosure materials embodying, reflecting or constituting communications subject to the presidential privilege of confidentiality. . . ." (Count 6, ¶ 20). This issue was settled by the parties in February 1979 and, therefore, was not included in the Third Amended Complaint.

ecutive discussion," which involves complex judgments that cannot be made in the abstract by archivists. Pet. App. 27a, citing *Nixon v. Administrator,* 433 U.S. at 449. This is particularly true in the case of the presidential materials at issue in this case since none of them will be available for disclosure until at least a decade after they were produced. *See* Pet. App. 20a. The court of appeals also observed that the incumbent President did not challenge the regulations (*id.* 20a), and, as this Court observed in *Nixon v. Administrator,* 433 U.S. at 449, "it must be presumed that the incumbent President is . . . in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."[7]

[7]The Petition contends that, because of the district court's limitations on discovery, President Carter's position concerning the tapes-access regulation was never revealed. Pet. 13. It was not necessary, however, to depose the White House Counsel or to review White House documents to discern the position of the Executive Branch. In *Nixon* v. *Administrator,* 433 U.S. at 441, this Court properly inferred President Carter's support for the Presidential Recordings and Materials Preservation Act from the positions of "the Administrator of General Services, . . . an official of the Executive Branch, appointed by the President," and of the Solicitor General. This Court did not require sworn testimony from President Carter or his counsel to discern his position. President Carter's Administrator of General Services promulgated and administered the regulations here at issue and the Department of Justice defended them vigorously in the courts below. Just as the actions of the Administrator and the Department of Justice were attributed to the incumbent President in *Nixon* v. *Administrator,* so must they be here.

In any event, the regulations were promulgated by the executive branch official charged with responsibility for doing so, and they stand on their own. It is improper and irrelevant to engage in detailed discovery concerning the persons who reviewed the regulations prior to their issuance. *See United States* v. *Morgan,* 313 U.S. 409, 422 (1941).

Finally, Mr. Nixon argues that the Administrator was required to select a means of public access to the tapes "less restrictive" than public listening. Pet. 9, 12-13. The form of access the Administrator chose, Mr. Nixon asserts, "constitutes the most significant intrusion upon the rights of the former President and others." Pet. 12. That form of access, however, must be viewed as the court of appeals viewed it – in the context of the complete regulatory scheme. *See* Pet. App. 24a-25a. That scheme provides significant protection for the rights of Mr. Nixon and others in the obligation of archivists to restrict materials pertaining to private or personal matters, and in the opportunity of individuals to assert a right of privacy, or any other legal or constitutional right, in challenging particular disclosures.

Allowing researchers to listen to the nonpersonal, nonprivileged portions of the tapes is, as the court of appeals held, a reasonable means of achieving the purposes of the Presidential Recordings and Materials Preservation Act. *See* Pet. App. 21a-22a. Those purposes include preserving "an accurate and complete historical record" of Mr. Nixon's presidency and "facilitating a full airing of the events leading to [his] resignation." *Nixon v. Administrator*, 433 U.S. at 452 n. 14, 453. "[T]he ability to listen and form one's own conclusion," the court of appeals stressed, "furthers the congressional goal of providing the public with full information about the Nixon Presidency." Pet. App. 23a.[8]

[8]The court of appeals indicated that Mr. Nixon's suggestions for alternative means of access – for example, disclosing the substance of the tapes via transcripts or synopses – did not "represent any further safeguard. . . significant enough to justify their interference with the Act's goal of public access." Pet. App. 22a. Mr. Nixon repeats his suggestions for such alternative means of access in his Petition. Pet. 13. As the court of appeals observed, it is difficult to see how disclosure of

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The regulation permitting researchers to listen to nonpersonal, nonprivileged portions of the tapes does not violate Mr. Nixon's constitutional rights, and the decision of the court of appeals upholding that regulation are consistent with this Court's decision in *Nixon v. Administrator*. Accordingly, the petition for a writ of certiorari on the tapes-access issue should be denied.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S DECISION IN *NIXON* V. *ADMINISTRATOR* IN ALLOWING ARCHIVISTS TO REVIEW DICTABELTS IN THE DETAIL NECESSARY TO DETERMINE WHETHER THEY CONSTITUTE A PERSONAL DIARY

The court of appeals upheld the archivists' proposed procedure for reviewing tape recordings, some of which may contain Mr. Nixon's personal diary entries. Contrary to Mr. Nixon's view, that procedure does not *require* that the archivists subject the dictabelts to "word-by-word" review. Pet. 14-16. Nor does that procedure vest archivists with "unlimited . . . discretion" to determine how to identify personal diaries. *Id.* 14. Rather, the procedure sanctioned by the court of appeals permits archivists to review the dictabelts "in the detail *necessary* to ascertain whether the dictabelt . . . constitutes a personal diary." Pet. App.

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the contents of the tapes via transcripts or synopses would lessen any interference with Mr. Nixon's rights; the only difference between allowing researchers to listen to the tapes and allowing researchers to read transcripts or synopses "would likely represent a difference of completeness or accuracy, not any difference even arguably relevant to protecting confidential matters." Pet. App. 23a.

31a (emphasis added).[9] "If an introductory phrase or certain portions of a tape reveal the tape to be a diary," the court below stressed, "the archivists will not review the tape further." *Id.* Furthermore, once diary material is identified by means of archival processing, the archivists, in keeping with this Court's decision in *Nixon v. Administrator*, will immediately return the material to Mr. Nixon. *Id.* 30a; 41 C.F.R. § 105-63.401(a). *See Nixon v. Administrator*, 433 U.S. 488 (White, J., concurring).[10]

Notwithstanding these limitations on the review procedure sanctioned by the court of appeals, Mr. Nixon urges that the regulations are defective for not *prohibiting* "word-by-word review." Pet. 16. But as an affidavit submitted in this case by Mr. Nixon himself makes clear, the physical form of the alleged diary and the wide variations in Mr. Nixon's procedures in dictating it provide no clear way to recognize all his diary entries.[11] Because of these variations in dictating procedures, the court of appeals

[9]The regulations mandate that the archivists "take all reasonable steps to minimize the degree of intrusion into private or personal materials." 41 C.F.R. § 105-63.401-2(a).

[10]All parties have agreed that if a diary is found in the materials in the Administrator's custody, it shall be returned promptly to the owner.

[11]Mr. Nixon's affidavit is attached hereto as Appendix 4, Opp. App. 21a-23a. In his affidavit, Mr. Nixon stated that his diary is contained on dictabelts and cassette tapes, but he did not allege that *all* tapes and cassettes in the Administrator's custody were part of his diary. Nor did he assert that the diary recordings were labelled as such. Thus, he conceded that the archivists would need to listen to at least an introductory sentence on each recording, but he claimed that it would not be necessary to go beyond that. However, the alleged introductory phrases used by Mr. Nixon were not consistent and are not sufficient standing alone to establish that a recording is part of a diary. For example, Mr. Nixon states in his affidavit that he began his dictation in a variety of ways, including vague sentences such as "Eleven twenty-five; December eight. I called . . . ." *See* Opp. App. 23a.

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held, no blanket restrictions can be placed on the archivists' "screening and identifying obligations under the [Presidential Recordings and Materials Preservation] Act." Pet. App. 35a. In order to further the important congressional interest in preserving "an accurate and complete historical record," *Nixon v. Administrator*, 433 U.S. at 452 n. 14 (quoting *Nixon v. Administrator*, 408 F.Supp. 321, 349 (D.D.C. 1976)), the archivists must be allowed enough flexibility to screen the dictabelts in the detail necessary to determine whether they constitute a personal diary. If some word-by-word review is necessary to make that determination, the archivists cannot, consistent with their responsibility for preserving a complete and accurate historical record, be prohibited from undertaking that review.

Mr. Nixon asserts that the court below "ignored" an alternative method for identifying Mr. Nixon's diaries, that is, using certain "triggering phrases" to identify the diaries whenever those phrases are adequate for that purpose, and, only if those phrases are inadequate, reviewing "such portions of the dictation as are necessary to determine its character." Pet. 15. In fact, however, the procedure upheld by the court of appeals is quite similar to the method that Mr. Nixon says he prefers. While emphasizing that Mr. Nixon's varied methods of dictating prevent the archivists from automatically and conclusively identifying diary entries by the presence of any "trigger phrases" (Pet. App. 36a), the court below noted that "[i]f an introductory phrase or certain portions of a tape reveal the tape to be a diary, the archivists will not review the

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Another obvious difficulty that the archivists will face in identifying any diaries is the fact that many of the entries were dictated in the Oval Office, where they were picked up by the voice-activated taping system and thus were intermingled with all other Oval Office conversations.

tape further." *Id.* 31a (emphasis added). Only if it is necessary to undertake some further review – perhaps including word-by-word review – will the archivists do so. *Id.*[12]

The decision of the court of appeals minimizes any intrusion that archival screening of the dictabelts might have on Mr. Nixon's privacy rights. The flexible screening process that the court of appeals upheld is required by the variety of Mr. Nixon's dictating procedures, as explained by Mr. Nixon himself. Accordingly, the petition should be denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. NIXON'S UNTIMELY DISCOVERY REQUESTS

Finally, Mr. Nixon contends that the district court abused its discretion in limiting his efforts to obtain discovery on two matters: the views of President Carter on the tapes-access regulation, and the restrictions on public access to tape recordings of the Kennedy and Johnson Administrations. The district court's limitations on Mr. Nixon's discovery efforts, however, were well within the court's broad discretion. *See* 8 *C. Wright & A. Miller, Federal Practice and Procedure* § 2036, at 267-68 (1970). Mr. Nix-

[12]We also note that Mr. Nixon did not urge the courts below to adopt this "alternative." Mr. Nixon's unequivocal position in the district court was that his alleged diaries could be easily identified on the basis of "triggering phrases." Moreover, the issue framed by the settlement agreement among the parties is limited to the question "whether materials which are claimed to be diaries shall be treated as inherently private or personal and therefore returned without any further archival processing." Appendix 2, hereto, Opp. App. 14a.

on's discovery efforts were untimely, and the issues before the district court were almost entirely legal in nature.

As described above, it was Mr. Nixon who suggested that discovery be "narrowly limited" and that the two issues left open by the settlement agreement be resolved by summary judgment. See Opp. App. 18a-20a. At the time Mr. Nixon moved for summary judgment, he had received responses to all the discovery requests that he had made since the execution of the settlement agreement. Mr. Nixon did not move for leave to depose the White House Counsel — in order to seek, *inter alia*, President Carter's views on the tapes-access regulation — until after he filed his motion for summary judgment. And he did not seek to depose the Archivist of the United States and a Deputy Assistant Archivist — to inquire, *inter alia*, into restrictions on public access to tape recordings of the Kennedy and Johnson Administrations — until more than a month after that, by which time all parties had filed their motions for summary judgment. These discovery efforts were untimely under Mr. Nixon's own schedule, and the district court cannot be held to have abused its discretion in denying them.

Furthermore, the matters into which Mr. Nixon sought to inquire were unnecessary or irrelevant to the resolution of the issues before the district court. Inasmuch as President Carter's Administrator of General Services promulgated, and his Department of Justice defended, the tapes-access regulation, no further inquiry into the President's position was necessary. *See* note 7, *supra*. In any event, the court of appeals' conclusion that the Administrator had devised a system for public access to the tapes that does not violate the Constitution did not depend on President Carter's position on the matter. See Pet. App. 38a. Similarly, the constitutionality *vel non* of the tapes-

access regulation does not turn in any way on the methods by which the tape recordings of prior administrations were made available to the public. *Id.* 39a. Indeed, in *Nixon v. Administrator*, 433 U.S. at 471-72, this Court rejected the notion that disposition of the presidential materials of the Nixon Administration should be governed by the treatment accorded the materials of other former presidents.

Mr. Nixon relies on *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), to support his assertion that the district court abused its discretion in this discovery matter. *Rickover* was a declaratory judgment action involving the question of ownership rights in intellectual property arising out of public employment. In remanding the case for a fuller development of the facts, this Court emphasized the importance of facts to a resolution of the particular issues presented, and the need for a "discretionary declaratory judgment" to "rest on an adequate and full-bodied record." *Id.* at 113. The record on which the lower courts had acted, the Court said, was "woefully lacking" in the development of facts critical to a resolution of those issues. *Id.*

Here, by contrast, the issues before the district court — issues concerning the constitutionality of regulations — were primarily legal in nature.[13] The question whether Mr. Nixon has a constitutionally protected personal privacy interest in communications relating to governmental matters could be decided on the basis of the law, without any belated inquiry into President Carter's views on the subject

[13]Because of the lack of factual issues involved, challenges to administrative regulations are particularly appropriate for resolution on summary judgment. *See* 6 *J. Moore, Federal Practice* ¶ 56.17[3] at 693-95.

or into the degree of public access to tape recordings of the Kennedy and Johnson Administrations. Thus, the court of appeals was plainly correct in holding that the district court did not abuse its discretion.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1982

APPENDIX 1

41 C.F.R. § 105-63.104(a) 2a
41 C.F.R. § 105-63.401 ..... 2a
41 C.F.R. § 105-63.401-1 ..... 4a
41 C.F.R. § 105-63.401-2 ..... 6a
41 C.F.R. § 105-63.401-3 ..... 9a
41 C.F.R. § 105-63.402-1 ..... 10a
41 C.F.R. § 105-63.402-2 ..... 12a
41 C.F.R. § 105-63.405 ..... 13a

§ 105-63.104 Definitions.

For the purposes of this Part 105-63, the following terms have the meaning ascribed to them in this § 105-63.104.

(a) *Presidential historical materials.* The term "Presidential historical materials" (also referred to as "historical materials" and "materials") shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties. Included in this definition are materials relating to the political activities of former President Nixon or members of his staff, but only when those activities directly relate to or have a direct effect upon the carrying out of constitutional or statutory powers or duties. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stock of publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.

§ 105-63.401 Processing period; notice of proposed opening.

(a) The Administrator will commence the initial archival processing of the materials. In processing the materials, the archivists will give priority to segregating

private or personal materials and transferring them to their proprietary or commemorative owner in accordance with § 105-63.401-3, below. As soon thereafter as possible, the Administrator will open for public access all of the materials in the Administrator's custody and control which are neither restricted pursuant to § 105-63.402 nor subject to outstanding claims or petitions seeking such restriction. The Administrator will open for public access each integral file segment of the materials upon completion of initial archival processing on that segment. Insofar as practicable, the Administrator will give priority in such initial archival processing to materials relating to abuses of governmental power as defined in § 105-63.104(c).

(b) At least 30 calendar days prior to the opening to public access of any integral file segment of the materials, the Administrator will publish notice in the *Federal Register* of the proposed opening. The notice will reasonably identify the material to be opened and will include a reference to the right of any interested person to file a claim or petition in accordance with § 105-63.401-1. Copies of the notice will be sent to the incumbent President of the United States or his designated agent and by first-class mail to the last known address of: Mr. Nixon, or his designated agent of heirs; any former staff member reasonably identifiable as the individual responsible for creating or maintaining the file segment proposed to be opened; any individual named in material which the Administrator may not restrict in accordance with § 105-63.402-1(b) because the material is essential to an understanding of an abuse of governmental power; and any persons named in the materials who are registered with the General Services Administration in accordance with § 105-63.401(c), below.

(c) The Administrator will maintain a registry which shall contain the names and mailing addresses of persons

who wish to receive personal notice of the proposed opening of integral file segments of the materials when those segments contain references about them. To be included in the registry, a person must submit his/her name and mailing address to the General Services Administration (NLN), Washington, D.C. 20408. Both the envelope and letter should be prominently marked, "Nixon Materials Registry." By submitting his/her name for inclusion in the registry, a person agrees to reimburse the United States for the cost of first-class postage for each instance of personal notice received.

§ 105-63.401-1 Rights and privileges; right to a fair trial.

(a) Within 30 days following publication of the notice prescribed in § 105-63.401(b), any person claiming a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Administrator in writing of the claimed right or privilege and the specific materials to which it relates. Unless the claim states that particular materials are private or personal (see paragraph (d), below), the Administrator will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the claimant, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the claimant of such notice.

(b) Within 30 days following publication of the notice prescribed in § 105-63.401(b), officers of any Federal, State, or local court and other persons who believe that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial should petition the Administrator setting forth the relevant circumstances

that warrant withholding specified materials. The Administrator will notify the petitioner by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the petitioner, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the petitioner of such notice.

(c) In reaching decisions required by paragraphs (a) and (b) of this section, the Administrator may consult with other appropriate Federal agencies. If these consultations require the transfer of copies of the materials to Federal officials in agencies other than the General Services Administration, the Administrator will transfer these copies in accordance with the procedures prescribed in §§ 105-63.204 and 105-63.302.

(d) Within 30 days following publication of the notice prescribed in § 105-63.401(b), any person claiming that materials proposed for public access are in fact private or personal, as defined in § 105-63.104(b), and that he or she is the proprietary or commemorative owner of those materials shall notify the Administrator in writing. The claim shall describe the specific materials to which it refers, and the claimant's basis for concluding that these materials are private or personal. Upon receipt of such a claim, the Administrator will transmit it to the Presidential Materials Review Board for its consideration and determination in accordance with § 105-63.401-2(i). The Administrator will refrain from providing public access to the pertinent materials or from returning them to the claimant for at least 30 calendar days from receipt by the claimant or any intervening parties of the Board's determination.

§ 105-63.401-2 Segregation and review; Senior Archival Panel; Presidential Materials Review Board.

(a) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate private or personal materials, as defined in § 105-63.104(b). The archivists shall have sole responsibility for the initial review and determination of private or personal materials. At all times when the archivists or other authorized officials have access to the materials in accordance with these regulations, they shall take all reasonable steps to minimize the degree of intrusion into private or personal materials. Except as provided in these regulations, the archivists or other authorized officials shall not disclose to any person private or personal or otherwise restricted information learned as a result of their activities under these regulations.

(b) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate materials neither relating to abuses of governmental power, as defined in § 105-63.104(c), nor otherwise having general historical significance, as defined in § 105-63.104(d). The archivists shall have sole responsibility for the initial review and determination of those materials which are not related to abuses of governmental power and do not otherwise have general historical significance.

(c) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate materials subject to restriction, as prescribed in § 105-63.402. The archivists shall have sole responsibility for the initial review and determination of materials that should be restricted. The archivists shall insert a notification of withdrawal at the front of the file folder or con-

tainer affected by the removal of restricted material. The notification shall include a brief description of the restricted material and the basis for the restriction as prescribed in § 105-63.402.

(d) If the archivists are unable to make a determination required in paragraphs (a), (b), or (c) of this section, or if the archivists conclude that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the archivists shall submit the pertinent materials, or representative examples of them, to a panel of senior archivists selected by the Archivist of the United States. The Panel shall then have the sole responsibility for the initial determination required in paragraphs (a), (b) or (c) of this section.

(e) If the Senior Archival Panel is unable to make a determination required in paragraph (d) of this section, or if the panel concludes that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the Panel shall certify the matter and submit the pertinent materials, or representative examples of them, to th Presidential Materials Review Board.

(f) The Presidential Materials Review Board ("Board") shall consist of the Archivist of the United States, who shall serve as Chairman, and the following additional members:

(1) The Assistant Archivist for the Office of the National Archives;

(2) The Assistant Archivist for the Office of the Presidential Libraries;

(3) The General Counsel of the General Services Administration; and

(4) A person, distinguished in archival science, history or political science, who shall not otherwise be a Federal employee or official, nominated by the Council of the Society of American Archivists.

The Board shall meet at the call of the Chairman. Three members of the Board shall constitute a quorum for the conduct of the Board's business, although each member of the Board may participate in all of the Board's decisions. Members of the Board may be represented by their delegates on those occasions when they are unable to attend the meetings of the Board. The Board may consult with officials of interested Federal agencies in formulating its decisions. To the extent these consultations require the transfer of copies of materials to Federal officials outside the General Services Administration, the Board shall comply with the requirements of §§ 105-63.204 and 105-63.302.

(g) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this section, the Board shall prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination.

(h) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraph (c) of this section, the Board shall recommend an initial determination to the Senior Archival Panel, which shall retain the sole responsibility for the initial determination.

(i) When the Board considers a matter referred to it by the Administrator as provided in § 105-63.401-1(d), it shall follow these procedures:

(1) The Board will notify the claimant of its consideration of the claim, and invite the claimant to supplement at his discretion the basis for the claim.

(2) The Board will publish notice in the *Federal Register,* advising the public of its consideration of the claim, and describing the materials in question as fully as reasonably possible without disclosing arguably private or personal information. The notice will further advise that any member of the public may petition the Board within 15 calendar days of the publication of notice, setting forth the intervenor's views concerning the public or private nature of the materials.

(3) The Board shall take into account the positions maintained by the claimant and any intervenors in reaching its decision. The Board shall issue its decision, including dissenting and concurring opinions, no sooner than 20 days nor later than 60 days from the publication of notice in the *Federal Register* provided in paragraph (h)(2), of this section. The Board's decision shall be the final administrative determination. The Administrator will notify the claimant and any intervenors of the Board's decision by certified mail, return receipt requested, and shall refrain from acting upon that decision for 30 calendar days as provided in § 105-63.401-1(d).

§ 105-63.401-3 Transfer of materials.

(a) The Administrator will transfer sole custody and use of those materials determined to be private or personal, or to be neither related to abuses of governmental

power nor otherwise of general historical significance, to former President Nixon or his heirs or, when appropriate and after notifying Mr. Nixon or his designated agent, to the former staff member having primary proprietary or commemorative interest in the materials.

(b) Materials determined to be neither related to abuses of governmental power nor otherwise of general historical significance, and transferred pursuant to paragraph (a) of this section, shall upon such transfer no longer be deemed Presidential historical materials as defined in § 105-63.104(a).

§ 105-63.402-1 Materials related to abuses of governmental power.

(a) The Administrator will restrict access to materials determined during the processing period to relate to abuses of governmental power, as defined in § 105-63.104(c), when:

(1) The Administrator, in accordance with § 105-63.401-1, is in the process of reviewing or has determined the validity of a claim by any person of a legal or constitutional right or privilege; or

(2) The Administrator, in accordance with § 105-63.401-1, is in the process of reviewing or has determined the validity of a petition by any person of the need to protect an individual's right to a fair and impartial trial; or

(3) The release of the materials would violate a Federal statute; or

(4) The materials are authorized under criteria established by Executive order to be kept secret in the in-

terest of national defense or foreign policy, provided that any question as to whether materials are in fact properly classified or are properly subject to classification shall be resolved in accordance with the applicable Executive order or as otherwise provided by law. However, the Administrator may waive this restriction when:

(i)(A) The requester is engaged in a historical research project; or (B) the requester is a former Federal official who had been appointed by the President to a policymaking position and who seeks access only to those classified materials which he originated, reviewed, signed or received while in public office; and

(ii) The requester has a security clearance equivalent to the highest degree of national security classification that may be applicable to any of the materials to be examined; and

(iii) The Administrator has determined that the heads of agencies having subject matter interest in the material do not object to the granting of access to the materials; and

(iv) The requester has signed a statement, which declares that the requester will not publish, disclose, or otherwise compromise the classified material to be examined and that the requester has been made aware of Federal criminal statutes which prohibit the compromise or disclosure of this information.

(b) The Administrator will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person: *Provided,* That if material related to an abuse of governmental

power refers to, involves or incorporates such personal information, the Administrator will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

§ 105-63.402-2 Materials of general historical significance unrelated to abuses of governmental power.

(a) The Administrator will restrict access to materials determined during the processing period to be of general historical significance, but not related to abuses of governmental power, under one or more of the circumstances specified in § 105-63.402-1(a).

(b) The Administrator will restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of these materials would:

(1) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; or

(2) Constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person; or

(3) Disclose investigatory materials compiled for law enforcement purposes, but only when the disclosure of such records would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures, or;

(vi) Endanger the life or physical safety of law enforcement personnel.

§ 105-63.405 Reproduction and authentication of other materials.

(a) The copying for researchers of materials other than tape recordings described in § 105-63.404 normally will be done by personnel of the General Services Administration using Government equipment. With the permission of the Administrator or his designated agent, a researcher may use his own copying equipment. Permission shall be based on the determination that such use will not harm the materials or disrupt reference activities. Equipment shall be used under the supervision of GSA personnel.

(b) The Administrator may authenticate and attest copies of materials when necessary for the purpose of the research.

(c) The fees for reproduction and authentication of materials under this section shall be those prescribed in the schedule set forth in Subpart 105-61.52 or pertinent successor regulation, as that schedule is amended from time to time.

APPENDIX 2

AGREEMENT

The parties enter into this Agreement in order to settle as many issues in this litigation as possible.

1. **Amendment of Regulations.**

The Administrator of General Services will submit to the Congress various modifications of the regulations that are the subject of this action. The regulations, as modified, are set forth in Attachment A. The Administrator has also prepared various documents to be included in a "Nixon Materials Archival Processing Manual," explaining the manner in which certain of the regulations will be interpreted or applied. These documents are set forth in Attachment B.

2. **Effective Date.**

This Agreement shall become final at such time as the regulations referred to in paragraph 1 become effective. In the event the regulations do not become effective, this Agreement shall be terminated.

3. **Continuation of This Action.**

Until the regulations become effective, all issues in this litigation will be held in abeyance except the issues of (a) whether the tape recorded presidential conversations may be made generally available for public listening ("the tape access issue"); and (b) whether materials which are claimed to be diaries shall be treated as inherently private or personal and therefore returned without any further archival processing ("the diary issue"). The parties have decided to litigate the tape access and diary issues independently of

this Agreement. In the event this Agreement is terminated, the parties may at that time resume litigation of any or all of the issues settled by this Agreement.

4. **Processing Prior to Final Settlement.**

Until this Agreement becomes final, the archivists may continue processing the materials in accordance with informal agreements reached by the Archivist and counsel for former President Nixon. Until this Agreement becomes final, there will be no public disclosure of any materials under the public access regulations and no activities with respect to the materials by the Presidential Materials Review Board.

5. **Dismissal of Various Claims For Relief.**

On or before February 28, 1979, plaintiff Nixon will file a third amended complaint challenging the validity of Section 105-63.404(b) and (c) of the regulations and raising the diary issue. When this Agreement becomes final, plaintiff will dismiss each of the claims set forth in the second amended complaint. With regard to the tape access and diary issues framed by the third amended complaint, plaintiff will not contend that the regulations are unconstitutional or void because promulgated subject to the one-House veto provision of the Act, and defendants will not contend that congressional acceptance of the regulations supports their validity. However, in the event this Agreement is terminated, the pleadings may be amended to raise such claims.

6. **Effect of Agreement on Other Litigation or New Regulations.**

In the event that, subsequent to the settlement of this action, any of the existing regulations or proposed

amended regulations are deleted or amended, or new regulations are added, plaintiff is not barred from challenging such changes and may assert any claims he may have and advance any arguments there may be with respect thereto. Plaintiff will not challenge any of the existing regulations or proposed amended regulations which are not affected by such post-settlement changes in the regulations.

In the event anyone challenges the validity of the existing or proposed amended regulations, this Agreement shall not bar any party from presenting any and all claims, defenses, or arguments there may be to sustain the validity of the challenged regulations or to invalidate the regulations as subsequently modified in response to a successful challenge thereto.

7. **Intervenor-Defendants.**

(a) This Agreement does not prevent members of the intervenor-defendant organizations, acting on their own behalf, from seeking modifications of any of the regulations or from challenging the validity thereof.

(b) This Agreement does not prevent the intervenor-defendant organizations from seeking modifications of, or challenging the validity of, any of the regulations, other than the amendments set forth in Attachment A and the standards and procedures described in the archivist processing manual material set forth in Attachment B.

(c) Without limiting the generality of the foregoing, this Agreement does not prevent intervenor-defendants from seeking a change in the regulations to provide that the Administrator will make available to members of the public copies of the tape recordings described in Section 105-63.404(a), and such an amendment will not operate to terminate this Agreement.

8. Other Documents

Together with this Agreement, the parties will file with the Court copies of (a) the letter to the General Services Administration from counsel for plaintiff, dated February 12, 1979, and (b) the letter to the General Services Administration and counsel for plaintiff from counsel for intervenor-defendants, dated February 14, 1979.

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON, *Plaintiff,*	)	
v.	)	
JOEL W. SOLOMON, as Administrator of General Services,	)	Civil Action No. 77-1395
Defendant,	)	
and	)	
THE REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *et al.,* *Intervenor-Defendants.*	)	

PLAINTIFF'S PROPOSED SCHEDULE FOR DISPOSITION OF REMAINING ISSUES

Counsel for plaintiff respectfully submit the following schedule for disposition of the issues remaining in this litigation after the settlement agreement between the parties.

March 7, 1979	Third Amended Complaint filed
March 19, 1979	Answers to Third Amended Complaint due
March 23, 1979	Parties may file limited requests for admissions, interrogatories

	or requests for production of documents reasonably necessary for the fiiing of dispositive motions.
March 28, 1979	Responses to Discovery Requests due
April 25, 1979	Plaintiff's Motion for Summary Judgment due
May 23, 1979	Defendants' Opposition and/or Cross-Motions for Summary Judgment due
June 1, 1979	Plaintiff's Reply to Defendants' Opposition and/or Cross-Motions for Summary Judgment due

Plaintiff contemplates that any discovery requests would be narrowly limited to Counts III and IV of the Third Amended Complaint, and in particular would be limited to (1) the manner in which the regulations and review procedures at issue therein will be implemented by defendant, (2) past practices of defendants in processing the tape and dictabelt materials in issue, insofar as these practices bear upon the reasonableness or unreasonableness of the current regulations, (3) and materials pertaining to the promulgation of these particular regulations. There should be little dispute about these facts. At the same time, their inclusion in the record, for purpose of summary judgment disposition, is necessary fully to inform the Court of the nature of the review and processing of which plaintiff complains. In the absence of these undisputed facts, the record upon which the Court would be forced to base its ruling would be inadequate.

Accordingly, we request that the Court approve the above-outlined schedule for disposition of the remaining issues in this litigation.

Respectfully submitted,

/s/ R. Stan Mortenson
R. Stan Mortenson

/s/ James E. Rocap, III
James E. Rocap, III

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Attorneys for Plaintiff

AFFIDAVIT

COUNTY OF ORANGE
STATE OF CALIFORNIA

Richard Nixon, being duly sworn under oath, deposes and says as follows:

(1) I am a citizen of the United States and a resident of the State of California, my residence being at San Clemente, California.

(2) From January 20, 1953 until January 20, 1961, I served as Vice President of the United States. I was elected President of the United States and served in that office from January 20, 1969 until my resignation on August 9, 1974.

(3) During my presidency, from November, 1971 until April, 1973 and again in June and July, 1974, I kept a diary expressing my personal reflections, thoughts, ideas and concerns with regard to the activities, events and conversations of that day or of immediately preceding days. This diary consisted of a series of dictated dictabelts which, frequently, I dictated on a daily basis.

(4) I considered all of these diary dictations to be of the utmost confidentiality. They reflected my innermost thoughts and feelings regarding a wide range of events and personalities. Often done at the end of the day, they recorded my personal emotions and reactions. Many of the thoughts and emotions expressed in them were not to be shared with anyone except the trusted personal secretary who – at sometime in the future – I would, out of necessity, have transcribe them for my review.

(5) One reason I kept a diary was so that after I left office, I could use it to help refresh my memory concerning the happenings in my life during a time I was often consumed in the day to day events.

(6) These diaries were never intended by me to assist in any way in the conduct of my duties as President. No member of my staff nor any personal friend or member of my family listened to these dictations during my presidency, except for the few that were turned over to the office of the Watergate Special Prosecutor. These dictabelts were kept at my express request in a safe with my personal records. They were not in fact referred to, nor did they ever serve as an aid in the conduct of my official duties.

(7) When I began keeping a diary in November of 1971, I dictated onto magnetic dictabelts. I always started the diary dictation on a new dictabelt, and I never combined it on the same dictabelt with dictation concerning official matters. I continued to use these dictabelts until 1973, when I also used a portable cassette tape recorder which enabled me to get more than one day's dictation on a single cassette. However, depending upon which office I was in when I dictated the diary entry, I continued intermittently to use the dictabelts.

(8) Because I was dictating the diary strictly for my own use, I began each dictation in a way which would readily distinguish it from other documents and memoranda that I also put on dictabelts. For example, if dictating a memorandum of instruction to my chief of staff, I would begin the dictation with: "This is a memorandum for Bob Haldeman." There might be variations, such as: "This is a memorandum for Bob Haldeman with copies to Herb Klein and Ron Ziegler," or words to that effect. My diary, however, was addressed to no one. Sometimes the dicta-

tion began with a statement of the date followed by the beginning of a recitation of events. For example, one began this way: "Eleven twenty-five; December eight. I called . . . ." As I continued to make these diaries, I began with greater regularity to preface them with opening comments designating them as private. For example: "March 9, 1972. Memorandum for the private file – not to be transcribed." Or "This is the second tape dictated for file, not to be transcribed – at Camp David on Saturday afternoon, January 6, 1973." In order to protect the privacy of these dictations, I would hand them directly to my personal secretary noting verbally that they were for my private file or would attach a note to the dictabelt itself, instructing that it be put in my private file and not transcribed. Thus, even my personal secretaries never listened to any portion of my dictated diaries.

(9) Sometimes I dictated diary entries in the Oval Office and in the Executive Office Building – both of which had room recording devices during a portion of my Presidency. I was not consciously aware that what I dictated into the microphone in my hand was also being recorded on my office taping system. If I had had that awareness, however, I would not have been concerned because, during my Presidency, it was my unqualified expectation that these diary dictations, along with the taped office and telephone conversations, would never be made public without my prior review and consent.

/s/ Richard Nixon
RICHARD NIXON

Subscribed and sworn to before me
on May 1, 1979
/s/ Pauline G. Egan
Pauline G. Egan